No. 18.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

L. A. TUCKER TRUCK LINES, INC.,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri.

BRIEF

Of L. A. Tucker Truck Lines, Inc., Appellee.

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OPINION BELOW.

The opinion of the District Court in L. A. Tucker Truck Lines, Inc., is reported in 100 F. Supp. 432 (R. 88).

JURISDICTION.

The appellee concedes the jurisdiction of this Court as set out at pages 1 and 2 of appellants' brief.

QUESTION PRESENTED.

The sole question presented reduced to its simplest form is: Are orders issued by an Administrative Agency following a hearing required by law but had before one not a hearing officer appointed in accordance with Section 11 of the Administrative Procedure Act valid?

STATUTES INVOLVED.

Section 207 (a) of Part II[1] of the Interstate Commerce Act, 49 Stat. 543, 551, 49 U. S. C. 307 (a), provides in part as follows:

> Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *.

The Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1001 et seq., provides in part as follows:

> Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *.
>
> Sec. 7. In hearings which Section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) **Presiding Officers.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; * * *.
>
> Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there

[1] Part II of the Act applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. Section 202 (a) of Interstate Commerce Act, 49 U. S. C. 302 (a).

shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. * * *

STATEMENT.

Excepting for the comments of appellants concerning the opinion of the District Court and its alleged refusal to give effect to certain rules, all as set out on page 9 of appellants' brief, appellee adopts the statement of appellants as fairly representing the history of the proceedings in the instant case both before the Interstate Commerce Commission and the District Court below.

SUMMARY OF ARGUMENT.

It is the contention of the appellee that the decision and order of the Court below in the instant case gave effect to the mandate of Congress as set out in the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., as well as to the construction placed upon that Act by this Court in the cases of **Wong Yang Sung v. McGrath**, 339 U. S. 33, and **Riss & Co. v. United States**, 341 U. S. 907.

Appellants admit that in **Riss & Co. v. United States**, supra, this Court held that hearing officers who conduct administrative hearings on applications for motor carrier certificates of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act must be appointed in accordance with Section 11 of the Administrative Procedure Act. What appellants apparently do not admit is that the decision of this Court in **Wong Yang Sung v. McGrath**, supra, ruled the case of **Riss & Co. v. United States**, supra, and also rules this case.

It is the contention of appellee that no jurisdiction to issue a valid order attaches to the Commission if a hearing held under Section 207 (a) of the Interstate Commerce Act was not held before a qualified hearing examiner. We submit that our position is sustained by the above referred to cases and that the decision of the District Court must be sustained.

We cannot agree with the various contentions of appellants that failure to have raised the objection respecting non-qualification of the hearing examiner before the Commission leaves us without a remedy.

Nor can we agree that the rule of Primary Jurisdiction is applicable to questions concerning which Congress has given the Commission no discretion or concerning which the Commission's expertise is not involved.

We cannot agree that appellee was guilty of laches or should have known that the Commission would act in violation of the law.

Nor can we agree that because the Commission has violated the law, this Court should now excuse such violation, even though appellee has been prejudiced, simply because appellee rightly presumed that the Commission would abide by the law and not violate it.

We do not recognize any exception in the Administrative Procedure Act which establishes a different standard with respect to the qualification of hearing examiners in cases involving applications for "initial licenses."

In conclusion, we submit that the Wong Yang Sung and the Riss & Co. cases, supra, must rule this case and we further submit that any other ruling would result in a reversal of said cases and in the ignoring of Congressional approval of this Court's interpretation of the Administrative Procedure Act.

ARGUMENT.

THE FINDINGS OF THE DISTRICT COURT WERE CONSONANT WITH THE LAW.

Appellants, on Brief, contend that the exact situation presented by the case presently before this Court was not present in the case of **Riss & Co. v. United States**, 341 U. S. 907. The difference to which appellants point is that in the instant case no objection was made to the qualification of the hearing officer at any time before the Commission. From this distinction, several arguments are drawn by the appellants in an attempt to justify the Commission's action and to secure reversal of the lower court. These arguments briefly address themselves: (1) to the question of waiver, and (2) to the "primary jurisdiction" rule. Of these two contentions of the appellants, we shall treat later.

What the appellants, however, overlook, whether through convenience or inadvertence, is that the case now before this Court is identical with that of Wong Yang Sung v. McGrath, 339 U. S. 33, l. c. 53, where this Court held:

> "We hold that deportation proceedings must conform to the requirements of the Administrative Act if resulting orders are to have validity."

This pronouncement was made by this Court in the face of the fact that petitioner in the Wong Yang Sung case had not at any time raised the question of qualification of the hearing officer until he filed his petition for habeas corpus in the District Court. It is to be noted specifically that the language of the Court does not leave any room for doubt that failure of the Administrative Agency to have conformed to the requirements of the Administrative Procedure Act renders the entire proceedings and all resulting orders invalid.

As if to persuade the Court by arguments of expediency, appellants have sought to divert this Court's attention

from the issues at hand and to inject into the case extraneous issues such as the question of validity of hundreds of orders issued by the Interstate Commerce Commission under Section 207 (a) prior to the Riss decision, in which proceedings none of the parties are alleged to have objected to the qualifications of any of the Commission's officers. Of course, excepting for unverified statements of counsel, there is no evidence before the Court, nor was there any before the Court below, concerning these matters.

We submit that any argument of convenience cannot be persuasive of the constitutional issue of due process as it may be applied in a given case.

A.

Whether the Appellee Had Opportunity During the Proceedings Before the Commission to Object to the Hearing Officer's Qualifications or Not Cannot Be Determinative of the Issues Involved Herein.

Appellants in their brief contend that the appellee was charged with knowledge during the pendency of the Commission's proceedings that the Commission interpreted the hearing officer's requirements of the Administrative Procedure Act as not applying to applications for Certificates of Convenience and Necessity under Section 207 (a) of the Interstate Commerce Act. This indeed puts an entirely new light upon the duty of a citizen of this country. We subscribe to the principle that citizens are charged with the knowledge of the law, but we cannot subscribe to the contention that a citizen is charged with knowledge that his Government, or any branch of his Government, will violate the law or is in violation of the law.

As the Honorable Rubey M. Hulen, one of the three Judges presiding in the court below, observed, at page 17 of the Transcript of Proceedings before the District Court

in the instant case, "I think there is a presumption of law that the Commission will obey the law and follow the law."

To suggest that the appellee should be estopped or that it has waived its rights by non-recognition of the Commission's law violation certainly begs the question before the Court and places upon the appellee and others involved in proceedings before the Commission an unconscionable and unheard of burden. Such argument and such contention is alien to our form of government and should not be heard by this Court.

In attempted justification of its position, the Commission indicates that it took the view that Sections 5, 7, 8 and 11 of the Administrative Procedure Act were applicable only where Congress has otherwise specifically required a hearing to be held. This Court in the Wong Yang Sung case, supra, reiterated a principle long established in the law with respect to the necessity for hearings and applied it to the language of Section 5 of the Administrative Procedure Act in the following quotation:

> "We do not think the limited words ('hearings required by statute') renders the Administrative Procedure Act inapplicable to hearings, the requirement of which has been read into a statute by the Court in order to save the statute from invalidity."

An early case involving this very same Commission which indicated the necessity for a hearing in all instances where the administrative function is quasi-judicial in character was that of **Interstate Commerce Commission v. L. & N. Railroad Co.**, 227 U. S. 88, l. c. 91, where this Court said:

> "Administrative orders quasi-judicial in character are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence."

Again, in the case of **Morgan v. United States**, 304 U. S. 1, l. c. 14 and 15, Chief Justice Hughes reiterated the same principle and cited a number of cases, all of which held that administrative proceedings of the type herein questioned, "demand a fair and open hearing, essential alike to the legal validity of the administrative regulation and other maintenance of public confidence in the value and soundness of this important Governmental process, such a hearing has been described as an 'inexorable safeguard.'"

The Commission in the face of such determination by this high court cannot, in the instant case, hide behind the erroneous and unwarranted construction placed upon the Administrative Procedure Act, after the Congress had legislated on the subject matter.

Certainly, the Commission can take no position other or different from that which the citizen can take, namely, that reliance upon private interpretation of the law does not excuse the resultant violation. Further, the history of proceedings before the Congress prior to the adoption of the Administrative Procedure Act indicates all Administrative Agencies of the Federal Government were requested to submit their views of the proposed legislation and to participate in advising and assisting the Legislative Branch of our Government in the adoption of the Administrative Procedure Act.

This Court recognized such history in observing in the Wong Yang Sung case, l. c. 40, that

"the McCarran-Sumners Bill, which evolved into the present Act, was introduced in 1945. Its consideration and hearing, especially of agency interests, was painstaking. All administrative agencies were invited to submit their views in writing. A tentative revised bill was then prepared and interested parties were again invited to submit criticism. The Attorney Gen-

eral named representatives of the Department of Justice to canvass the agencies and report their criticism, and submitted a favorable report on the Bill as finally revised."

Thus, should there have been any doubt in the Commission's mind of the applicability of the Administrative Procedure Act, the Commission had ample opportunity to secure Congressional definition of any questions it may have had relative to the requirements of the Administrative Procedure Act, or on the other hand, it could have requested exemption from all or a part of the provisions of said Bill.

The history of the Riss & Co. case, as distinguished from the decision of this Court in that case, is not at all persuasive of the issues involved herein, nor can the decisions of the lower court therein be considered either as having justified the Commission's position, nor as having put this appellee on notice that the examiner assigned to the Cunningham case was not a hearing officer qualified in accordance with the requirements of the Administrative Procedure Act.

Again, as the Honorable Rubey M. Hulen so aptly observed at page 17 of the Transcript of Proceedings in the District Court, that, "If the Commission can put it over without the man learning about it, that is all right?"

The entire burden of appellants' argument points to an affirmative answer to the above question. We submit there is no basis in law to support the appellants' contention.

B.

The Primary Jurisdiction Rule Is of No Pertinence to the Instant Proceedings.

Under Paragraph B of their argument, appellants attempt to invoke the Primary Jurisdiction Rule in support of their position and cite numerous cases in support thereof,

many of which have announced and reiterated the general rule relative to the exhaustion of administrative or legal remedies.

While we do not propose to quarrel with or find any fault in the Primary Jurisdiction Rule, or as otherwise stated, the rule which requires the exhaustion of administrative remedies, we submit that the matters of which this appellee complained in the court below relative to the lack of qualification of the hearing examiner and the resulting defect and invalidity of the Commission's order do not invoke the principle announced in the Primary Jurisdiction Rule or that pronounced in the cases which sustained the proposition that administrative remedies must be exhausted before recourse is had to the courts.

The above two rules which are substantially identical, have reiterated and emanated from the long standing rule that matters may not be urged on appeal which were not urged in the court below. However, where the court below, for some reason or other, did not acquire jurisdiction, either because the litigation then before it was of such character that the court did not possess the jurisdiction or because the one before whom the trial was had was not qualified as a Judge in accordance with the law, such question is never waived and may be raised at any time in the course of the proceedings or on appeal for the first time.

We say that the Primary Jurisdiction Rule is not pertinent because the cloak which the courts have thrown around the findings of administrative agencies so as to require one to exhaust all remedies before the agency before pursuing an appeal in a court of law has related only to matters or questions over which that agency has jurisdiction. In other words, the courts have constantly maintained and held that the Congress having charged, for example the Interstate Commerce Commission, with the

duty of determining whether from the facts public convenience and necessity requires the institution of another carrier service, the courts should not substitute their judgment for that of the Commission nor should the court interfere with the Commission's orderly process in adjudicating such an issue because the courts have recognized that such adjudications by the Commission involve the exercise of an expert judgment entrusted by Congress to the Commission. However, the question of whether the hearing examiner was duly qualified in accordance with the mandate of Congress was expressed in the Administrative Procedure Act, and the further question of whether or not proceedings under Section 207 (a) are such as to require a hearing, are not matters which call for the expertise of the Interstate Commerce Commission; these are matters which have been settled and determined by the Courts and by Congress. These are matters which have been enjoined upon the Commission and for the failure of observance of which the Commission may not and cannot be heard to complain when their invalid action has been attacked. The Congress has not given to the Commission the right to adjudicate such matters as above referred to. The Congress has set a minimum standard of conduct to be observed by the Commission in proceedings of that sort and has left nothing to the discretion or judgment of the Commission.

To compare the denial of due process with the reception of inadmissible evidence received without objection; to compare the denial of due process with the waiver of the privilege against self incrimination; with the rule relevant to the introduction of newly acquired evidence; with the failure to have raised an issue that rates were confiscatory or with any other similar matter wherein the complaining party waives his rights before the hearing agency, is the comparison of black and white. On the one hand, we have guaranteed rights, on the other, rights which may be pre-

served solely by the raising of timely objection. The various and sundry cases referred to by the appellants at pages 19, 20, 21, 22, 23, 24, 25, 26 and 27 of their brief, have no pertinency or relevancy to the issues involved herein nor do cases such as **Myers v. Bethlehem Shipbuilding Corporation**, 303 U. S. 41, where at l. c. 47, wherein this Court said:

> "There is no claim by the corporation that the statutory provisions and the **rules of procedure prescribed** for such hearings are illegal. * * * The claim is that the provisions of the Act (NLRA) are not applicable to the corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold in interstate or foreign commerce." (Emphasis supplied.)

The Court concluded at l. c. 50 in the Myers case above:

> "The contention is at war with the long settled rule of jurisdictional relief for a supposed and threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.
>
> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing, would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The decisions in the cases of **W. J. Dillner Transfer Co. v. United States**, 101 F. Supp. 506, and of **Democratic**

Printing Co. v. Federal Communications Commission, decided on June 12, 1952, in the Court of Appeals for the District of Columbia Circuit, are at variance and directly in conflict with the decision of this Court in **Wong Yang Sung v. McGrath,** supra. The rationale of those decisions cannot be conformed to the unequivocal pronouncement of this Court in the Wong Yang Sung case.

It is with interest that we note the arguments of appellants relative to the impact of the requirements of the Administrative Procedure Act on proceedings under Section 207 (a) of the Interstate Commerce Act. These arguments, however, dissipate themselves under the pronouncement of this Court in **Wong Yang Sung v. McGrath,** supra, wherein it was said, l. c. 41:

> "One purpose (of the Administrative Procedure Act) was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. **We pursue this no further than to note that any exception we may find to its applicability would tend to defeat this purpose.**" (Emphasis supplied.)

However, in desperation do the appellants strain when it suggested that appellee was not prejudiced by the resultant order of the Commission. We submit the line has been drawn so thin that this charge merits but little attention other than to point out that the burden of appellee's complaint before the Court was that it was prejudiced and deprived of its property rights through the arbitrary and capricious action of the Commission. Certainly, the assigning of the case to one not a hearing examiner was arbitrary and capricious and the general allegations of the complaint as to appellee's being prejudiced carry over to the defect alleged in the First Amendment to the Petition.

Attempt is made to suggest that Section 7 (a) of the Administrative Procedure Act provides for timely objection to the qualification of the hearing officer. A close reading of this Section points up the fact that Congress was there referring to "bias or disqualification" of either the "agency", "one or more members of the body comprising the agency", or "one or more examiners **appointed** as provided" by the Administrative Procedure Act, and not to non-qualification of the hearing examiner resulting from failure of appointment of such examiner as provided for in Section 11 of the Administrative Procedure Act. In this connection we again advert to the suggestion of the Honorable Rubey M. Hulen, one of the District Court Judges who heard this case below, that the argument of appellants suggests the theory that, "if the appellee goes ahead on the assumption that the Commission will obey the law and follow the law, and he later learns that the Commission did not so act, the rights of the appellee have been extinguished?" We cannot believe that this Court will uphold the contention of appellants on this point.

Appellants admit that **Riss & Co. v. United States**, supra, has decided and put to rest the question of whether or not Section 207 (a) proceedings are of such nature as to require a hearing, and that in the instant case the hearing was not had before a qualified hearing examiner. Such being the case, **Wong Yang Sung v. McGrath**, supra, must rule the case.

Appellants are not aided in their contention by the decision in the case of **Harisiades v. Shaughnessy**, 342 U. S. 580, which they contend held that the lack of qualification of an administrative hearing officer is not jurisdictional in that it invalidates administrative action. If such were the holding in the **Harisiades v. Shaughnessy** case, supra, we submit that **Wong Yang Sung v. McGrath**, supra, and **Riss & Co. v. United States**, supra, were overruled. How-

ever, we do not so read the **Harisiades v. Shaughnessy** case, and we are sure appellants would not so read same had they read footnote 4 on pages 583-584 of 342 U. S. 580 in its entirety. The referred to footnote, as well as the remarks of the Court which gave rise to the footnote, follow:

l. c. 583:

> "Validity of the hearing procedures is questioned for non-compliance with the Administrative Procedure Act which we think here is inapplicable (footnote 4)."

and in footnote 4, l. c. 583-584:

> "Petitioner Harisiades and appellant Coleman contend that the proceedings against them must be nullified for failure to conform to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., Section 1001 et seq. However, Section 12 of the Act, 60 Stat. 244, 5 U. S. C., Section 1011, provides that . . . 'no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.' The proceedings against Harisiades and Coleman were instituted before the effective date of the Act. Harisiades also contends that, the Administrative Procedure Act aside, he was denied procedural due process in that his 1946-47 hearings the same individual acted both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades' consent. He, therefore, has no standing to raise the objection now."

In the above quoted portion of Section 12 of the Administrative Procedure Act, we have, at least by inference, a Congressional mandate that the procedural requirements of the Administrative Procedure Act are **mandatory** in agency proceedings initiated after the effective date of the Act.

Questions of expediency only have been raised by the appellants in their brief. Of these, we may say that the Commission tried in vain to secure the passage of remedial legislation in the 82nd Congress under the guise of H. R. 5045, which sought to amend the Administrative Procedure Act as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 10 (e), subdivision (b), item (4), of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress) is amended to read as follows:
>
> "'Without observance of procedure required by law, except that no action, findings, or conclusions in any proceeding instituted under the Interstate Commerce Act prior to April 17, 1951, shall be held unlawful or be set aside solely because an officer specified in section 7 (a) did not preside at the hearing and make an initial or recommended decision, unless objection thereto is made prior to the conclusion of the hearing or if the hearing in any such proceeding was begun but not concluded prior to April 17, 1951, and such objection was not made prior to the specified date.'"

This Bill, H. R. 5045, failed of passage. We submit such non-action of the Congress in the face of the decision in **Riss & Co. v. United States**, supra, and in the light of the Commission's advice to the Congress of the result of such decision unless H. R. 5045 were enacted, is tantamount to Congressional and Legislative approval of this Court's construction of the Administrative Procedure Act.

As this Court further said in **Wong Yang Sung v. McGrath**:

> "But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high. The agencies, unlike the

aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter."

Here relief was sought but Congress deemed that the "price for greater fairness is not too high," for though the Commission had ready access to the legislative ear, a deaf ear was turned on their plea, most probably because the Congress, like this Court, determined that even an arm of the Government cannot violate the law without the imposition of appropriate sanctions. We are still a Government of laws and not of men, expediency cannot defeat Constitutional guarantees, whether such guarantees be of due process or otherwise.

With respect to the argument in appellants' brief at page 32 thereof, we, of course, cannot subscribe to the views expressed therein, particularly in the light of the history of the Riss case recited earlier in appellants' brief. Aside, however, from the questions there raised the fact still remains that the question of validity of the order by reason of the Cunningham case originally having been assigned for hearing to one not a qualified hearing examiner, under the Administrative Procedure Act, has been settled by the express pronouncement of this Court in the Wong Yang Sung case, supra.

C.

Appellants May Not Presume That Appellee Was Not Injured by Reason of the Lack of Qualification of the Hearing Examiner and This Court May Not, Where Basic Constitutional Issues and Rights Are Involved, Consider Matters Not of Record in the Instant Case.

Again, we find the appellants contending that appellee has never alleged that it was actually prejudiced by the fact that the Cunningham application had been heard before an examiner not appointed in accordance with Section

11. As previously indicated, the position of the appellee in the court below with reference to all of the objections raised against the Commission's order was that appellee was prejudiced. However, in the passage of the Administrative Procedure Act, the Congress did not set up prejudice as a test for validity of agency orders or for the requirement that hearings of a quasi-judicial nature be held before qualified hearing examiners. The law will presume that where one acts without authority or in violation of law, prejudice will result. If we are to have an ordered society, such must necessarily be the rule. To contend otherwise would be to permit every citizen to take the law into his own hands as occasion may, in the mind of that citizen, dictate from time to time. We can see no merit to the contention of appellants here, but rather, see in this contention the act of the drowning man grasping for straws. Appellants state that it is doubtful whether such prejudice, as above referred to, would ever exist under Section 207 (a) proceedings. Of course, the applicability of the Administrative Procedure Act to Section 207 (a) proceedings is one for the wisdom of the Congress and not of the administrative agency or the courts. This again was recognized by this Court in **Wong Yang Sung v. McGrath**, supra, l. c. 45.

The arguments of appellants that Sections 5 (c) and 8 (a) are not applicable in the case of hearings on applications for "initial licenses," are of no avail in the light of the decision of this Court in the case of **Riss & Co. v. United States**, supra, which decision the appellants admit in their brief is conclusive of the question that applications for motor carrier certificates of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act must be heard by examiners appointed in accordance with Section 11 of the Administrative Procedure Act.

In further pursuit of appellant's contention that the Administrative Procedure Act and the **Riss & Co. v. United**

States decision, is not controlling in the instant case, a most unusual observation is made at page 35 of appellants' brief and argument to the effect that while the importance of Section 11 is not to be minimized, the requirement of the appointment of examiners subserves the long range objectives of the Act rather than the immediate interest of the parties to administrative proceedings. We have never been apprised of a rule which would hold that to secure the rights of citizens, it is necessary that the same rights be denied to another citizen. We feel that the Supreme Court in the **Wong Yang Sung v. McGrath** case has adequately answered this contention at l. c. 41, wherein the Court stated that:

> "Any exception we may find to its applicability (Administrative Procedure Act), would tend to defeat this purpose,"

and the purpose of the Act which the Court was there addressing itself to was the introduction of greater uniformity of procedure and standardization of administrative practice. Also, the suggestions contained in this portion of the argument suggests that the appellants contend for an affirmative answer to the Honorable Rubey M. Hulen's question noted previously in this brief.

As to Section 10 (e) of the Administrative Procedure Act, we submit that while the provisions of said Section require the Court to take due account of the rule of prejudicial error, that said section further provides that the reviewing court shall hold, "unlawful and set aside agency actions, findings, and conclusions found to be * * *, (2) contrary to Constitutional right, power, privilege or immunity; * * * (4) without observance of procedure required by law."

We submit, in view of the determination of this Court in **Wong Yang Sung v. McGrath**, supra, that failure to conform to the requirements of the Administrative Procedure

Act and more particularly with reference to the holding of hearings before a qualified hearing examiner, renders all subsequent orders of the agency void, accordingly this Court has no alternative other than to sustain the decision and findings of the trial court.

Again, we find resort of appellants to the rule of expediency in its discussion relative to the numbers of cases tried before the Commission after June 11, 1947.

With respect to this contention, we, at the expense of being repetitious, submit:

1. That there has been no evidence of record relative to the factual situation in these cases or even as to the numbers of them, consequently, we submit that this Court cannot give consideration to this argument.

2. That the rule of expediency cannot control where Constitutional rights and guarantees of due process have been violated. The proposition that two wrongs can make a right, we submit, has never been subscribed to by this Court or by this Government.

With respect to the alleged five thousand cases above referred to, no attempt is made to suggest in what percentage of them, if any, questions concerning the qualifications of the hearing examiner was raised. We assume from the gist of the appellants' argument that if such question had been raised before the Interstate Commerce Commission, that the Interstate Commerce Commission will admit that the orders in those cases are invalid. Consequently, this Court cannot be advised merely upon the unverified statement of appellants as to the impact of the decision of this Court upon the Commission or the motor carriers affected by the invalid orders of the Commission in the other cases. Resort is had to the doctrine of laches of the appellants, which, we submit, can have no application, inasmuch as there is no showing in this record by appellants that the

appellee, in the instant case, was at any time earlier advised relative to the status of the examiner who was assigned to hear the instant case. To invoke the doctrine of laches, it is incumbent, of course, upon the appellants to show, among other things, that the appellee was not diligent in determining the invasion of its rights. This, of course, in the instant case would presuppose that the appellee, and for that matter, all citizens in dealing with their Government, must presume that their Government is not acting in accordance with law. We do not believe that this Court will find that a citizen of these United States has such a duty or should be required to indulge in such an unheard of presumption. Should such be the law of the case, we submit that we have done violence to our form of Government.

The arguments indulged in by appellants at pages 37 and 38 relative to rehearings, of course, are highly speculative and remote and are not proper for adjudication in this case. The balancing of equities in the instant case in the manner suggested by appellants would, of course, result in inequity. The suggestion relative to the appointment of many of the examiners as hearing examiners following the Riss & Co. case can lend no validity to the orders of the Commission in the instant case any more than the situation where the trial of a civil action is had in a court of competent jurisdiction before one who has assumed illegally the position of Judge without qualification, but who after having heard and determined the question is later legally appointed and qualified. Such later appointment and qualification cannot have the effect of validating nunc pro tunc the prior unauthorized illegal and invalid action. Nor in the example cited would it be necessary for either one of the litigants to have raised the question of the qualification of the "would-be" Judge at the trial in order to have his invalid judgment or order set aside by an appellate court.

With respect to the entire question of the Congressional attitude towards the Commission's illegal action and violation of the terms and provisions of the Administrative Procedure Act, we submit that the Congress, as previously pointed out, has turned a deaf ear to the plea of the Commission that its invalid action be validated.

D.

Conclusion.

Accordingly, and in conclusion, it is submitted:

1. That this Court has spoken on two previous occasions with respect to the very situation before it in the instant case and has in each instance held the action of the agency invalid where the initial hearing was not had before a hearing officer.

2. Congress, by its non-action on H. R. 5045, has indicated its approval of this Court's decision in both cases and has indicated that it will not dignify or validate violations of law by any branch or arm of our Government.

It, therefore, remains for this Court to affirm the judgment and order of the Court below in the instant case and to give notice to all who would ignore the law that such violations are intolerable under our form of Government.

Respectfully submitted,

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October 10th, 1952.